78-1687

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

ALAN J. WHITE,

Petitioner,

vs.

OFFICE OF PERSONNEL MANAGEMENT,

JOYCE L. EVANS, Individually and as Acting Director, Office of Administrative Law Judges, and

EDWARD A. SCHROER, Individually and as Director, Office of Management,

Respondents. */

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALAN J. WHITE
8201 Snug Hill Lane
Potomac, Md. 20854

Petitioner,
in propria persona

*/ See Footnote 1 on page 1 for information pertaining to substitutions of respondents.

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1/ The defendants below consisted of the UNITED STATES CIVIL SERVICE COMMISSION, which has been succeeded by the Office of Personnel Management; CHARLES J. DULLEA, Director, Office of Administrative Law Judges, who retired and has been succeeded by Joyce L. Evans; and DONALD J. BIGLIN, Assistant Executive Director for Freedom of Information and Privacy, who retired and has been succeeded by Edward A. Schroer. The respective successors are being substituted as respondents herein pursuant to Rule 48.

Alan J. White, in propria persona, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals") entered in this proceeding on December 11, 1978, together with the orders of the Court of Appeals entered on January 26, 1979, denying rehearing and rehearing en banc.

OPINIONS BELOW

The opinion of the Court of Appeals (4a through 9a) is reported at 589 F.2d 713 and (prospectively) ___ U.S.App.D.C. ___. The orders of the Court of Appeals (1a through 3a) and the United States District Court for the District of Columbia ("District Court") (10a and 11a) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 11, 1978 (4a), and orders

denying a timely petition for rehearing and suggestion for rehearing en banc were entered on January 26, 1979 (1a through 3a). By order of April 19, 1979, the Chief Justice extended the time for filing a petition for a writ of certiorari to May 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an applicant for a civil service rating may challenge his application record under the Privacy Act of 1974, for the purpose of causing his record to be changed, pending final agency action on the merits of his rating application and independent of any prospective right under the Administrative Procedure Act to judicial review of that final agency action, or whether the applicant may challenge his application record under the Privacy Act only in conjunction with a challenge under the Administrative Procedure Act of the final agency action

and only for the purpose of obtaining money damages. 2/

2. Whether Subsection (k)(5) of the Privacy Act of 1974, which authorizes a limited withholding of investigatory material, deprives an applicant for a civil service rating of a property right without due process of law, as guaranteed by the Fifth Amendment to the Constitution, when an agency withholds part of his application record in reliance on that statutory provision and thereby diminishes the applicant's ability to challenge that record.

2/ The terms "Privacy Act" and "Privacy Act of 1974" are used in this petition to distinguish 5 U.S.C. § 552a from other portions of the Administrative Procedure Act ("APA"). The Freedom of Information Act (§ 552), the Privacy Act of 1974 (§ 552a) and the Government in the Sunshine Act (§ 552b) are enlargements of the former Section 3 of the APA, while 5 U.S.C. §§ 701-706 are a codification of the former Section 10. In this context, the instant litigation under the Privacy Act is in fact brought under the APA.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Amendment V to the Constitution provides, in pertinent part,

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Sections (a), (d), (e), (g) and (k) of the Privacy Act of 1974, 5 U.S.C. § 552a(a), (d), (e), (g) and (k), and certain regulations of the United States Civil Service Commission under the Privacy Act, 5 CFR § 297.101, .104, .111, .112, .113 (except (b)) and .117(b)(1)(iii), are contained in a separate Statutory and Regulatory Appendix.

STATEMENT OF THE CASE

The petitioner, Alan J. White ("White"), is a member of the bar of this Court, and has authored a number of opinions of the Federal Power Commission and continues to author opinions of its

successor, the Federal Energy Regulatory Commission. 3/

In January 1976 White filed an application in the Office of Administrative Law Judges ("Office of ALJs") of the United States Civil Service Commission ("CSC") to be rated for an administrative law judge position. The Office of ALJs processed his application; obtained evaluations of him, among other matters; and advised him on August 13, 1976, that while he met the requirements of the civil service announcement, his score was insufficient to meet the passing grade.

On the next workday, August 16, 1976, White asked the Appeals Review Board ("Board") of the CSC to review that rating action. At the same time, he asked the Board under the Privacy Act to make available to him the record on which the Office of ALJs had rated him, including the

3/ White authored FPC Opinion Nos. 740, 740-A and 740-B which are currently under review by this Court sub nom Federal Energy Regulatory Commission v. Billy J. McCombs, et al., No. 78-249.

various evaluations of him. White said in his combined request, "I will elaborate upon the bases [for administrative review of the rating action] after being given an opportunity to review the record. . . ."

The Board would not immediately review the rating action. Instead, it referred White's request for review back to the Office of ALJs for reconsideration. The Board did so as a "matter of practice", and not pursuant to any statute or regulation. On December 2, 1976, almost 4 months later, the Office of ALJs advised White on reconsideration that his rating was "reasonable and proper", and referred him to the Board for further review. On December 7, 1976, White asked the Board again to review the rating action. 4/

4/ The review which was conducted in response to his second request was not independent because the Board received and presumably considered a memorandum from the Office of ALJs dated January 25, 1977, in which the Office of ALJs concluded that "the full record supports the ineligible rating assigned to White's application." White was never provided access to "the full record" and has not, therefore, been able to challenge it.

In the meanwhile, White was unsuccessful with his Privacy Act request. Although he was permitted to see the record in November 1976, 3 months after he asked that it be made available, White was limited substantially to the materials he had furnished to the CSC. Virtually everything else had been removed. And although he was furnished copies of the evaluations which had been returned by persons who did not request confidentiality of their identities, White was furnished only censored copies of the others.

One "evaluation" by a former central figure of his employer was so malicious, libeling White's abilities and character, that on October 22, 1976, he asked the CSC pursuant to the Privacy Act to remove it from his record together with four other evaluations. The CSC did not do so. In fact, the CSC did not even acknowledge receipt of White's request as is specifically required by Subsection (d)(2)(A) of the Privacy Act and the

related CSC regulation. 5/ White therefore treated the CSC's inaction as a refusal to act and requested review. On December 22, 1976, 3 weeks after White was advised on reconsideration that his rating was "reasonable and proper", the CSC informed White on review that it would not remove the five evaluations from his application record. The CSC thereby exhausted his administrative remedies under the Privacy Act for judicial review of that refusal as is specifically authorized by Subsection (g)(1)(A).

In February 1977, 7 weeks later, White initiated this litigation under the Privacy Act (invoking the jurisdiction of the District Court under Section (g)) alleging that the CSC solicited the evaluations of him in violation of the

5/ The CSC admitted in its Answer to the Complaint which White later filed to initiate this litigation that it did not acknowledge receipt of his request. The acknowledgement is more than technical; it starts the subsequent period for acting on the request. And the CSC's inaction evidences its nagativism towards the Privacy Act.

Privacy Act and that the CSC did not comply with that Act and its own regulations thereunder in refusing to remove the five evaluations from his record. White alleged that the CSC violated his rights under the due process clause of the Fifth Amendment and particularly to fair consideration for public employment, including consideration for placement on the eligible civil service list. And White asked for an order to require the CSC to remove the five evaluations from his application record and reconsider his rating on the basis of the corrected record, as well as money damages. 6/

The CSC admitted the allegations of fact, including the allegation that it had not acknowledged receipt of White's privacy request, but denied the conclusion that it (the CSC) violated

6/ The exchange of correspondence pertaining to White's requests for access to his record became so complicated that White did not seek access in his Complaint. Instead, he chose to utilize discovery procedures to obtain access to his record.

the Privacy Act and its own regulations.

White's counsel withdrew in July 1977, at which time the District Court directed the CSC's counsel to file a motion for summary judgment.

At or about the same time the CSC responded to White's requests for discovery but declined to provide a substantial amount of information which he sought. As a result, White filed a motion to obtain that information, explaining among other matters his constitutional right of access to his application record (which is discussed later). But the District Court would not rule on that motion. Instead, the District Court stayed all discovery on October 17, 1977, and gave the CSC additional time to file the motion for summary judgment which it had directed.

That motion was filed shortly thereafter and was granted in December 1977 in an 18-line order (10a and 11a) in which the District Court said (1) the records in issue are not the sort of records which are subject to amendment under the

Privacy Act, (2) White's rights under the Privacy Act have been honored and (3) the Privacy Act is not a proper vehicle for appealing a CSC rating. Thereupon, White sought review by the Court of Appeals.

On April 14, 1978, 4 months after the District Court granted summary judgment for the CSC, the Board reviewed the rating action of the Office of ALJs without having given White an opportunity to elaborate on the bases for such review, as he had requested. The Board thereby exhausted White's administrative remedies for judicial review under the APA of the Office of ALJs' rating action. That occurred 20 months after White first attempted to initiate administrative review of that rating action, 16 months after White exhausted his administrative remedies with respect to the CSC's privacy action not to amend his record, and 14 months after White initiated this litigation to vindicate his rights under the Privacy Act.

On December 11, 1978, a panel of the Court of Appeals decided that White's application records are indeed records which are subject to amendment under the Privacy Act. The Court of Appeals said that it disagreed with the grounds for dismissal offered by the District Court. But the Court of Appeals also said that it was premature to grant relief under the Privacy Act because such relief "would tend to undermine the established and proven method" of reviewing agency actions under the APA. And the Court of Appeals affirmed the District Court, holding sua sponte that White could not enforce any rights he might have under the Privacy Act independent of a lawsuit under the APA to review the CSC's rating action.

Although the Court of Appeals said that its holding does not in any way seek to jeopardize rights under the Privacy Act to which White may ultimately be entitled, it did not address the District Court's holding that White's rights under the Privacy Act have been honored. Nor did

the Court of Appeals address the fact that the two year statute of limitations for initiating a lawsuit with respect to several of White's causes of action had expired or would expire within the period for initiating rehearing.

White filed a petition for rehearing and suggestion for rehearing en banc. He pointed out that the Court of Appeals' holding that he could not enforce his rights under the Privacy Act independent of a lawsuit under the APA to review the CSC's rating action, had not been argued or briefed to the Court of Appeals and was in direct conflict with certain decisions of this Court and the Eighth Circuit. White also complained that since his right to initiate judicial review under the APA of the CSC's rating action ripened during the course of the appeal, the Court of Appeals should have reversed the District Court and remanded the proceeding to enable him to obtain judicial review of the rating action in conjunction with judicial review of the privacy action.

He complained that although the Court of Appeals said that its holding does not jeopardize his rights under the Privacy Act, the fact that it affirmed the District Court in the face of the running of the statute of limitations, instead of reversing and remanding, precluded him from reasserting those expired privacy claims.

In addition, White complained of the Court of Appeals' failure to address the District Court's ruling that his rights had been honored. And once again he raised the due process issue, including the constitutionality of Subsection (k)(5) of the Privacy Act.

REASONS FOR GRANTING THE WRIT

1. The Privacy/Administrative Procedure Question

The Congress finds that --

* * *

(3) the opportunities for an individual to secure employment . . . and his right to due process, and other legal protections

are endangered by the misuse of certain information systems;

(4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and

(5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies. 7/

In the light of the foregoing findings, Congress enacted the Privacy Act of 1974 for the purpose of providing safeguards for individuals against invasions of personal privacy, by requiring Federal agencies to

* * *

(3) permit an individual to gain access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;

(4) collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that . . . the information is current and accurate for its intended use . . .

7/ Section 2(a) of the Privacy Act of 1974, 5 U.S.C. § 552a, Historical Note.

* * *

(6) be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act. 8/

In order to implement the purpose of safeguarding individuals in the light of the finding that privacy is a fundamental right protected by the Constitution, Congress provided in Section (e) that agencies shall

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination. . . . (Emphasis added.)

Congress thereby established a standard of fairness to the individual in maintaining records concerning that individual, and equated it to due process under the Constitution. But since Congress also defined the term "maintain" as including "collect" and "use" 9/, Congress has

8/ Section 2(b) of the Privacy Act of 1974, 5 U.S.C. § 552a, Historical Note.

9/ Subsection (a)(3).

required that agencies comply with the due process standard of fairness to individuals in collecting information about them, and in using that information.

In order to assure that agencies would comply with the due process standard of fairness to individuals, Congress provided in Section (d) that individuals who are subjects of agency records can review them and have copies made upon request, and can have any parts of them corrected which the individuals believe are not accurate, relevant, timely or complete. 10/ Those rights have come to be known as the rights of access and challenge. They were included in the original bill and are essential to the enforcement of the Privacy Act.

In order to assure that individuals who are subjects of agency records would have their rights of access and challenge, Congress provided

10/ Subsection (d)(3) contains certain procedural requirements of a substantive nature which are discussed later.

in Section (g) that such individuals could bring civil actions in the district courts of the United States against agencies which might deny those rights. Specifically, Congress said in Subsection (g)(1)(B) that individuals can bring civil actions whenever any agency refuses to comply with a request for access. Congress said in Subsection (g)(1)(A) that individuals can bring civil actions whenever any agency determines "not to amend an individual's record in accordance with his request", or whenever any agency fails to review a request to amend a record in conformity with Subsection (d)(3). And Congress said in Subsection (g)(1)(C) that individuals can bring civil actions whenever any agency fails to maintain (, collect and use)

> any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual. . . .

While agency records can thus be challenged in court under Subsection (g)(1)(A) or Subsection (g)(1)(C), or both, there are fundamental differences between the two provisions and, consequently, between the respective challenges.

The purpose of a challenge under Subsection (g)(1)(A) is to amend the record pertaining to the individual, as is specifically authorized by Subsection (g)(2)(A), so that future agency determinations which are based on that record will be based on information which the individual considers to be accurate, relevant, timely and complete. 11/ Consequently, there is no pre-challenge requirement, as in the case of Subsection (g)(1)(C), that an adverse determination shall have been made on the basis of that record.

In the light of the purpose to amend the record before it results in any determination about the individual, Subsection (g)(1)(A) permits

11/ Subsection (g)(1)(A) implements paragraphs (3) and (4) of the Congressional purpose, supra.

a challenge simply because the agency determines not to change the record or fails to comply with the Subsection (d)(3) procedures. An individual invokes those procedures by requesting amendment of a record pertaining to him pursuant to Subsection (d)(2), and thereafter the agency is required by Subsections (d)(2) and (d)(3) to take certain actions within certain time limits which, as implemented in this litigation, total 100 workdays. 12/

12/ Subsection (d)(2)(A) requires the CSC to acknowledge receipt of the request within 10 days. Subsection (d)(2)(B) then requires the CSC to act on the request "promptly", either by amending the record in accordance with the request, or by informing the individual of its refusal to do so, "the reason for the refusal" and certain other matters. ("Promptly" is defined by Regulation 297.112(a)(2)(ii)(D) to mean within 30 days.) In the event of a refusal to amend the record, the individual may within 30 days (Regulation 297.113(a)) request administrative "review of such refusal" (Subsection (d)(3)); and if he does so Subsection (d)(3) requires the CSC to complete the review within another 30 days (subject to extension for good cause shown). If the reviewing official then refuses to amend the record in accordance with the request, the CSC must permit the individual to file with it "a concise statement setting

In other words, a request pursuant to Subsection (d)(2) to amend a record ordinarily ripens for judicial review under Subsection (g)(1)(A) not later than 100 workdays after it is received by the CSC. And once the request ripens, the individual may then bring a civil action to challenge the agency's determination not to amend his record within two years (Subsection (g)(5)) after the final refusal to amend the record in accordance with the request. In such litigation, the court is directed by Subsection (g)(2)(A) to determine the matter de novo.

The purpose of a challenge under Subsection (g)(1)(C), on the other hand, is to obtain money damages resulting from an adverse agency

12/ (Continuation of footnote.)

forth the reasons for his disagreement with the refusal of the agency" and notify the individual of the provisions for judicial review under Subsection (g)(1)(A). (All time periods exclude Saturdays, Sundays and holidays. And, as specified by Regulation 297-.101, the procedure and time periods apply to every agency and department in the executive branch except two.)

determination based on a record which the individual believes is not accurate, relevant, timely and complete. 13/ Although an award of money damages is specifically required by Subsection (g)(4)(A) when the court determines that the agency acted in a manner which was intentional or willful, the Privacy Act is silent as to the consequences of a court's not finding either intent or willfulness. Furthermore, the Privacy Act is silent as to whether the agency determination based on the record may be an initial or interim one, or must be a final one such as will support judicial review of that determination under the APA.

In any event, in the light of the purpose to obtain money damages resulting from an adverse determination based on the record, there is no pre-challenge requirement, as in the case of Subsection (g)(1)(A), that a request to amend a

13/ Subsection (g)(1)(C) implements paragraph (6) of the Congressional purpose, supra.

record be made and refused. Instead, Subsection (g)(1)(C) permits an individual to bring a civil action for money damages simply because he believes he has been damaged by an adverse determination (whether initial, interim or final, as this Court may determine) based on a record which he believes does not meet the fairness standard of Subsection (e)(5). 14/

The right to bring such an action ripens with the adverse determination. And once it ripens, the individual may then bring a civil action to challenge the agency's maintenance, collection and use of the record within two years after the adverse action based on the record. As stated by the Office of Management and Budget in its guidelines (40 FR 28969, July 9, 1975), Subsection (g)(1)(C) "allows an individual to test the

14/ However, Subsection (e)(5) speaks of accuracy, etc., which is "reasonably necessary to assure fairness to the individual", whereas Subsection (g)(1)(C) speaks of accuracy, etc., which is "necessary to assure fairness in any determination," etc.

agency's compliance with subsection (e)(5)" which, as indicated, establishes the due process standard of fairness to individuals. Finally, Subsection (g)(2)(A), which specifically authorizes changes of records and requires judicial determination de novo in suits under Subsection (g)(1)(A), is NOT expressly applicable to suits under Subsection (g)(1)(C).

Assuming that a civil action for money damages under Subsection (g)(1)(C) ripens with a final agency determination, then it would overlap to some extent with judicial review of that final agency action under the APA. Both would ripen at the same time; but the former would expire two years later and the latter, six years later. The former involves a standard of fairness to the individual; the latter, a standard of arbitrariness. A litigant would be well advised to sue under both Subsection (g)(1)(C) and the APA if he chooses to sue under either, but there is no requirement that he do so.

A litigant would be well advised to include any claims under Subsections (g)(1)(A) and (D) which are still viable. But since there is no assurance that his prospective claims under Subsection (g)(1)(C) and the APA will ripen within the two year period in which he can sue under Subsections (g)(1)(A) and (D), he would also be well advised to sue under the latter as soon as possible and to amend his Complaint to state the additional claims if and when they arise.

In addition to authorizing access and challenge lawsuits under Subsections (g)(1)(A), (B) and (C), Congress said in Subsection (g)(1)(D) that individuals can bring civil actions whenever any agency fails to comply with any other provisions of the Privacy Act or any rules promulgated under the Privacy Act, in such a way as to have an adverse affect on them. Under authority of that provision, the petitioner alleged in his Complaint that the Office of ALJs solicited evaluations of him on June 1, 1976, and that the

individuals who were asked to supply the information were not informed of the authority for the solicitation and whether disclosure of the information (to the Office of ALJs) was mandatory or voluntary, as required by Subsection (e)(3)(A) and Regulation 297.104(a). The petitioner also alleged that they were not informed of the effects of not providing all or part of the requested information, as required by Subsection (e)(3)(D) and Regulation 297.104(d). 15/

The CSC admitted in its Answer that the individuals were not informed of the matters alleged. The CSC thereby admitted to violations of the Privacy Act and its own regulations under the Privacy Act and, consequently, that the petitioner has a cause of action under Subsection (g)(1)(D) if he can show that the violations affected him

15/ Another aspect of the CSC's solicitation violations, namely, its routine offers to keep the names of informants confidential, is more closely associated with the constitutionality issue and is discussed thereunder.

adversely. Nonetheless, the District Court held that the petitioner's rights under the Privacy Act had been honored. And while the Court of Appeals said (6a) "we disagree with the grounds for dismissal offered by the trial judge", it affirmed summary judgment for the CSC and thereby terminated the petitioner's action based on these violations. Since the solicitation of evaluations occurred on June 1, 1976, more than two years ago, the petitioner cannot now initiate another lawsuit to litigate these violations.

The actions of the two courts have left these properly raised issues undecided and, as a result, the Office of ALJs probably is continuing to violate the Privacy Act in connection with every rating application in which it solicits evaluations of the applicant. And the Office of ALJs probably will so violate the Privacy Act when the petitioner files another rating application in 1979.

Under authority of Subsections (g)(1)(A) and (D), the petitioner alleged that the CSC violated the Privacy Act and its regulations thereunder in a much more serious and flagrant manner in connection with his request to amend his record. These violations run to the core of the concept of requests to amend records and, consequently, to the heart of the Privacy Act itself. The Court of Appeals terminated the petitioner's action based on these violations; and because they occurred in the latter part of 1976, more than two years ago, the petitioner cannot now initiate another lawsuit to litigate them.

The petitioner's letter of October 22, 1976, requesting deletion of the five evaluations, was 20 pages in length and was supported by numerous attachments. It complied fully with Regulation 297.111(e)(4) which requires "A statement of the basis for the requested correction or amendment, with all available supporting documents and materials which substantiate the statement."

Within 10 workdays of its receipt, the CSC was required by Subsection (d)(2)(A) and Regulation 297.112(a)(1) to acknowledge its receipt in writing and provide an estimate of time within which action would be taken on the request. The CSC admitted in its Answer that it did not acknowledge in writing the receipt of the petitioner's request. It thereby admitted to another violation of the Privacy Act and, consequently, to a prima facie cause of action under Subsection (g)(1)(D).

As provided by Regulation 297.112(a)(2), the written acknowledgement is an important procedural step because it marks the beginning of a 30 day period for acting on the request.

In the event the action is a refusal to amend the record in accordance with the request, Subsection (d)(2)(B)(ii) requires the agency to inform the individual of the reason for the refusal. Similarly, Regulation 297.112(a)(2)(ii)(C) requires the CSC (and substantially all other

agencies, and all departments and corporations, in the executive branch) to inform the individual of the reasons for denial, including citation of the appropriate sections of the Privacy Act and its regulations.

The CSC did not provide the petitioner with the required written information. Instead the CSC mentioned the petitioner's request to amend his record in the Office of ALJs' letter of December 2, 1976, advising the petitioner on reconsideration that his rating was "reasonable and proper", and then said defiantly,

> Concerning the . . . requests in your October 22 letter, this office is unaware of any basis for deleting or expunging particular evaluations from an official record.

The foregoing denouncement of the Privacy Act itself was an "intentional or willful" act of the CSC within the purview of Subsection (g)(4). The contempt of the CSC towards the Privacy Act, as reflected in its implicit refusal to inform the petitioner of the reasons why it would not amend

his application record, is one of the most important aspects of this litigation.

It was the intent of the Senate Government Operations Committee to provide a "responsive" agency process for resolving such requests. As a result, the agency's statement of reasons must answer responsively the "statement of the basis for the requested correction or amendment, with all available supporting documents and materials which substantiate the statement," which is required from the individual by Regulation 297.111(e)(4).

In other words, the question of whether an agency can ignore a request to amend a record, either totally or through a superficial statement of reasons, is at stake in this litigation. As provided in Regulation 297.101, the CSC's body of regulations under the Privacy Act is applicable to every agency, department and corporation in the executive branch of the government, except the Central Intelligence Agency and the Federal

Bureau of Investigation. If this Court condones the CSC's "stonewall" of the petitioner's request contrary to its own regulations, then virtually every such agency, department and corporation will act accordingly. The vitality of the Privacy Act itself is at stake, for the right to challenge a record under it would indeed become a hollow one.

If an individual disagrees with the refusal of an agency to amend his record, he is permitted by Subsection (d)(3) to request a review of such "refusal", and by Regulation 297.113(a) to submit a written appeal within 30 days. The individual's papers are supposed to include, per Regulation 297.113(c), "a statement of the reasons why the initial denial is believed to be in error." (Emphasis added.) As understood by the petitioner, the submission is not supposed to be a restatement of the request to amend the individual's record, but something which is responsive to the reasons which are given by the agency for refusing that request.

Thereafter, the agency is required by Subsection (d)(3) to complete its review within 30 days and by Regulation 297.113(f) to "state the reasons for the denial." Finally, the individual is permitted by Subsection (d)(3) "to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency" (emphasis added) and by Regulation 297.113(f)(1) "to file a concise statement of reasons for disagreeing with the final determination." (Emphasis added.)

The Privacy Act and the CSC regulations under the Privacy Act establish a procedure by which an individual and the agency are required to sharpen the issues pertaining to possible amendment of the individual's record before a court is asked to consider those issues under Subsection (g)(1)(A). The procedure contemplates that each succeeding step will be responsive to the preceding step, so that if and when the matter goes to court the issues will have been formulated and the court

can decide them in a summary or expedited manner. Instead of a single request and answer, the individual and agency are allowed, in effect, two requests and answers before the formal Complaint and Answer in court. Hopefully, one will accede to the other, or they will resolve their differences within the agency, so that the record will be changed, if it is to be changed, before it is acted upon, either initially or finally. Resolution of the issues within the agency should reduce the number and difficulty of subsequent court challenges (1) of refusals to amend records under Subsection (g)(1)(A), and (2) of final agency actions for damages under Subsection (g)(1)(C) and arbitrariness associated with records under the APA.

While the foregoing procedure is reasonably designed to reduce the volume and complexity of litigation under both the Privacy Act and the APA, agencies will not comply with it as long as they believe that they can avoid "coming to grips"

with the merits of requests to amend records. That is the problem in this case. The CSC's violations are so flagrant that the District Court apparently didn't recognize them as such. If the Court of Appeals' decision is allowed to stand, the word will soon be out, if it is not already out, that agencies don't have to come to grips with the merits of such requests because the courts will support them by sidetracking any litigation which is brought to enforce agency compliance, as the District Court did in this instance.

Under authority of Subsections (g)(1)(A) and (C), the petitioner challenged his application record for the purposes of amending his record and obtaining money damages. He was obviously entitled to such under Subsection (g)(1)(A), first, because the CSC determined not to amend his record in accordance with his request, and second, because the CSC did not answer his request with a statement of reasons and thereby

made it impossible to conduct a review in conformity with Subsection (d)(3). He sued under Subsection (g)(1)(C) alleging that the CSC made an adverse determination on December 2, 1976, when the Office of ALJs advised him on reconsideration that his rating was "reasonable and proper". If the latter claim was premature because the adverse determination on that date was an interim one, that defect is now cured because a final adverse determination was made on April 14, 1978.

In any event, the District Court granted summary judgment for the CSC for the reasons indicated, and the Court of Appeals said it didn't agree with them. But the Court of Appeals failed to distinguish between the petitioner's challenge under Subsection (g)(1)(A) to amend his record, and his challenge under Subsection (g)(1)(C) for money damages. And, as a result, it made certain errors.

The petitioner would direct this Court's attention to the fact that Subsections (g)(1)(A) and (C) appear on the same page of the United States Code Annotated, and that one does not discern that Subsection (g)(1)(A) pertains to amendments of records until he reads Subsection (g)(2)(A) at the bottom of that page, or that Subsection (g)(1)(C) pertains to money damages until he reads Subsection (g)(4) on the next page. In view of the statutory arrangement and the Court of Appeals' express disclaimer that "our holding does not in any way seek to jeopardize rights under the Privacy Act to which appellant may ultimately entitled", as well as Footnote 4 to the effect that Privacy Act claims are properly undertaken simultaneously with review of the administrative action under the APA, it is likely that the Court of Appeals believed that the petitioner could get a full measure of relief by initiating a new combined Privacy Act and APA civil action.

That, of course, is not true. While the Court of Appeals' holding may not jeopardize the petitioner's rights under the Privacy Act, its action affirming judgment for the CSC (which is not a necessary element of its holding) arbitrarily denies him such rights. All of the petitioner's causes of action under Subsections (g)(1)(A) and (D) are now barred by the statute of limitations. These include the petitioner's challenge of the solicitation of evaluations of him, his challenge of the processing of his request to amend his application record and his challenge of the record itself for the purpose of changing it. Only his challenge of the record for damages, and his prospective challenge under the APA of the final agency action based on his record, are not yet barred.

The Court of Appeals, by holding that the subject of a government record can challenge that record only in conjunction with the individual's challenge of an agency action based on that

record, is undermining the rights of access and challenge and, indeed, the Privacy Act itself. The Court of Appeals is wrong in suggesting that Congress didn't intend the Privacy Act to provide an avenue of relief which is distinct from the "established and proven method" under the APA. But even if that were true, which is disputed, the Court of Appeals is wrong in affirming a judgment against the subject of the record, instead of reversing the District Court and remanding the proceeding, when the subject of the record, at the time of challenging the agency's determination not to amend his record, could not have initiated an APA challenge of the agency action based on his record, but can now initiate such a challenge.

The Court of Appeals is wrong in treating the Privacy Act as one which confers cumulative rights enforceable only in connection with other rights which the subject of a government record might have. Although the Privacy Act is an

outgrowth of the APA, and is part of it, it is a comprehensive and complete statute which does not combine the right to maintain a lawsuit thereunder with an obligation to include claims under other parts of the APA.

Neither the petitioner nor the CSC argued to the Court of Appeals that the subject of a government record cannot maintain a lawsuit under the Privacy Act without also invoking other possible remedies. The panel chose on its own initiative to so dispose of this litigation, and the novelty of its holding is apparent from the following clarifying augmentation of the last sentence of its opinion:

> We stress that our holding does not in any way seek to jeopardize rights under the Privacy Act to which appellant may ultimately be entitled; rather we hold that his reliance on any such Privacy Act rights in the instant Privacy Act suit is inappropriate. (Underscored words added.)

There is nothing in the Privacy Act or its legislative history to suggest that such a result was intended. Indeed, the legislative history of

the civil remedy provision (Section (g)) suggests the opposite result, namely, that lawsuits under the Privacy Act were intended to stand independently.

As indicated, the rights of access and challenge were included in the original Privacy Act bill. While that bill would have provided appeal rights to an independent regulatory body, the Senate Government Operations Committee, in a later bill, rejected the concept of review by such a new agency, stating with respect to the later bill,

> Instead, the individual may seek review within the agency [maintaining the record] and direct judicial review by the Federal District Court in the event the agency rejects the challenge to its records.
>
> * * *
>
> It is the Committee intent to substitute for regulatory agency review, a responsive speedy, agency process for resolving citizen's [sic.] complaints about improper, illegal, or careless information practices of the Federal Government. Where many agencies may provide a review process after a harmful decision is made with the information, this section anticipates special initiative by agencies to extend existing processes, or to establish new procedures to encompass requests for access and challenge at an earlier stage in the management of the information. (Emphasis added.)
>
> As discussed previously, the Committee deems such access and challenge rights essential to enforcement of the Act, and as an aid to monitoring the system. . . . 16/

Although the procedures described in Senate Report No. 93-1183 were modified in the final compromise, there is nothing in the Analysis of House and Senate Compromise Amendments to the Federal Privacy Act 17/ to suggest that the final compromise departed from the Senate concept of challenge at an early stage in the management of information. Indeed, that is precisely what White tried to do when he attempted to initiate

16/ Senate Report No. 93-1183, at page 63. See U.S. Code Cong. and Adm. News, 93rd Cong., Second Sess., 1974, at page 6977.

17/ The procedure by which the Privacy Act was finally enacted is described on page 40880 of the Congressional Record, December 18, 1974. Instead of a Conference Report, there was an Analysis of House and Senate Compromise Amendments to the Federal Privacy Act which begins on page 40881.

Board review of the rating action of the Office of ALJs, and requested access to his record saying, "I will elaborate upon the bases /for administrative review of the rating action/ after being given an opportunity to review the record. . . ."

While the Court of Appeals cites no authority for its holding, there is authority to the contrary. In Churchwell v. United States, 414 F. Supp. 499 (1976), a discharged employee filed a lawsuit under the APA to assert alleged constitutional rights, and the government moved to dismiss and in the alternative for summary judgment on the ground, among others, that she had not exhausted her administrative remedies because she had not pursued her remedies under the Privacy Act. The district court said, 414 F. Supp., at 501,

> With this remarkable argument I cannot agree. The mere fact that other statutory remedies exist certainly does not entitle a defendant to select which theory a plaintiff must proceed under. See Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

and denied the government's motion for summary judgment, and granted partial summary judgment for Churchwell. On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the district court, 545 F.2d 59 (1976), stating at 61,

> The United States initially contends that Churchwell's "liberty interests" are adequately protected under the Privacy Act and therefore Churchwell should pursue that remedy rather than proceeding with her claim for a hearing pursuant to the due process clause of the fifth amendment. This argument implies that the Privacy Act remedy should be exhausted before Churchwell proceeds under the fifth amendment. There is no authority for such a proposition. Where two avenues of relief are equally available to a plaintiff, the defendant cannot argue that the failure to pursue one particular remedy has any bearing on the viability of the other form of relief. Indeed, the United States did not specifically state that Chruchwell should be compelled to exhaust her Privacy Act remedies before presenting due process claims; rather, the United States argued that the Privacy Act remedy was a more appropriate choice. Churchwell, as the party who brought the suit, is "master to decide what law /she/ will rely upon * * *." Bell v. Hood, 327 U.S. 678, 681, 66 S.Ct. 773, 775, 90 L.Ed. 939 (1945); The Fair v. Kohler Die Co., 228 U.S. 22, 25, 33 S.Ct. 410, 57 L.Ed. 716 (1912). (Emphasis added.)

Ironically, the government argued in Churchwell that the Privacy Act was a more appropriate choice -- but there was at least a choice between the APA or the Privacy Act, or both. In this case, the petitioner's right to judicial review under the APA had not ripened when he initiated this litigation under the Privacy Act and, therefore, he did not have a choice.

The petitioner submits that the Court of Appeals' holding that he can challenge his rating application record under the Privacy Act only in conjunction with a challenge under the APA of the agency action based on that record, conflicts directly with the Eighth Circuit in Churchwell, and that this Court should grant the writ to resolve that conflict.

The petitioner submits, additionally, that the Court of Appeals' holding contravenes the long established principle of this Court that "the party who brings a suit is master to decide

what law he will rely upon". The Fair v. Kohler Die Co., 228 U.S. 22, 25 (1912); Bell v. Hood, 327 U.S. 678, 681; Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656, 662 (1961). That principle has been cited by numerous courts for two-thirds of a century and cannot now be open to question. If the petitioner is master to decide what law he will rely upon, and if the CSC cannot properly argue that he should sue under the APA in order to maintain an action under the Privacy Act, then the Court of Appeals cannot properly hold that he must sue under the APA in order to maintain his action under the Privacy Act.

And the petitioner submits, finally, that even if the Court of Appeals' holding is correct, and even if the Court of Appeals can decide what law he must sue under, there is no reason why this litigation must be terminated. A remand with leave to amend would satisfy the goals of the Court of Appeals and protect the petitioner's rights.

The Court of Appeals said (8a),

> If in this action we were to grant appellant the relief he seeks under the Privacy Act [18/], our decision would tend to undermine the established and proven method by which individuals, distressed by agency treatment of their employment applications, have obtained review from the courts. [19/] There is absolutely no indication that Congress had this in mind when it passed the Privacy Act. [20/]

18/ "/T/he relief he seeks under the Privacy Act" apparently refers to the amendment of the record because the Court of Appeals does not mention in its opinion the petitioner's claim for money damages.

19/ Ironically, one of the areas in which applicants for administrative law judge ratings are evaluated is their "Willingness to establish new precedents or procedures when the facts merit such actions." (Item 8c of the evaluation form.)

20/ But, as has been shown, Subsection (g)(1)(C) implements paragraph (6) of the purpose of the Privacy Act requiring agencies to "be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act." Therefore, Subsection (g)(1)(C) provides an alternative or supplement to the "established and proven method", contrary to the Court of Appeals' statement.

If the Court of Appeals is saying that a successful challenge of the CSC's determination not to amend the petitioner's application record would tend to undermine a subsequent challenge under the APA of the CSC's rating action based on that record 21/, it is misconstruing the remedial statutory purpose of challenging the record for the purpose of changing it. That purpose is a prophylactic one to prevent agency actions being based on inaccurate, irrelevant, untimely and incomplete information, and to obviate any future need to challenge the record for damages or to challenge the agency action based on that record. Accordingly, the Privacy Act supports rather than undermines the APA, and has its own place in the scheme of administrative procedure.

21/ The Court of Appeals' statement seems to affirm the District Court ruling that the Privacy Act is not a proper vehicle for appealing a CSC rating, notwithstanding that the Court of Appeals said (6a) that it disagreed with the grounds for dismissal offered by the trial judge.

The unique place of the Privacy Act includes time limitations for amending agency records which cannot be slowed down to accommodate slower procedures, under the APA, for challenging agency actions based on those records. If it is desirable to challenge a record under Subsection (g)(1)(A) in the same litigation with the final agency action based on that record, as the Court of Appeals apparently prefers, then the agency's administrative review of its actions must be speeded up to accommodate the time frames of Subsections (d)(2) and (3) of the Privacy Act. If the agency's administrative review is not speeded up, the individual must be permitted to proceed with his challenge under Subsection (g)(1)(A), consistent with the expressed intent of the Senate Government Operations Committee to provide a speedy agency process for resolving citizens' complaints about information practices. Otherwise, the individual would be forced to wait for the final agency action based on that record,

which might not come within the two year period following the agency's refusal to amend the record.

Although the CSC has made a final determination based on the petitioner's application record, the petitioner's challenge under Subsection (g)(1)(A) for the purpose of changing his record can still serve the prophylactic purpose of preventing agency actions being based on inaccurate, irrelevant, untimely and incomplete information. If the District Court ultimately decides that the record of the petitioner's 1976 rating application should be changed, it can invoke its inherent authority to require a rerating based on the changed record. That would be a particularly appropriate remedy if the District Court finds that the CSC's action was not intentional or willful and, consequently, the petitioner cannot recover money damages under Subsection (g)(1)(C).

Furthermore, the petitioner is currently eligible to file an application for a new rating and proposes to do so shortly after filing this petition. Untruthful evaluations which have hurt him in the past will continue to do so in the future as long as they remain in his record and are used. Therefore, the petitioner's challenge under Subsection (g)(1)(A) for the purpose of changing his record can continue to serve a prophylactic purpose with respect to his future application for a rating. Whether or not reconsideration of his 1976 application would result in a passing rating, consideration of a 1979 application based on a changed record could result in a passing rating or a higher passing rating.

Since the statute of limitations applicable to the petitioner's causes of action under Subsections (g)(1)(A) and (D) has run, the only action of this Court which would enable him to cause his record to be changed and otherwise

obtain a full measure of relief, would be to grant the writ and, either now or ultimately, reverse both the Court of Appeals and the District Court and remand the proceeding, giving the petitioner leave to amend his Complaint to assert the claims under the APA which ripened when this litigation was in the Court of Appeals.

2. The Constitutionality Question

Section (k) provides, in pertinent part,

> The head of any agency may promulgate rules . . . to exempt any system of records within the agency from [Section (d) of this Act] if the system of records is --
>
> * * *
>
> (5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment . . . but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this [Act], under an implied promise that the identity of the source would be held in confidence. . . .

Subsection (k)(5) therefore authorizes a limited withholding of investigatory material from the subject of the record, as distinguished from information which is contained within that material.

The CSC promulgated Regulation 297.117(b)-(1)(iii) to implement Subsection (k)(5) with respect to access to records under Section (d), and has utilized Subsection (k)(5) to withhold information from the petitioner, as well as identities of informants. This statutory provision is, perhaps, the greatest source of conflict between the petitioner and the CSC, and its constitutionality has been challenged by the petitioner at every step of this proceeding.

The Subsection (k)(5) exemption is a major source of conflict because the CSC is doing precisely what it is not supposed to do under the Privacy Act. It is offering confidentiality routinely to everyone asked to evaluate applicants for administrative law judge ratings.

It is supposed to offer confidentiality selectively, and only to the extent necessary to obtain a sufficient number of evaluations of a particular applicant.

The Office of ALJs routinely applies a rubber stamp to the signature block of its evaluation form, offering confidentiality to any informant who checks a box for that purpose. Congressman Erlenborn, who sponsored Subsection (k)(5), said in this connection (36646 Cong. Rec., November 20, 1974),

> /T/he Office of Management and Budget has assured me that regulations will be adopted in the future so that only in the most compelling circumstances will a promise of confidentiality be given. It will not be the customary thing to make these promises of confidentiality, so that most all of the information will be available.

The Office of Management and Budget said in its guidelines (40 FR 28974, July 9, 1975) that Subsection (k)(5)

> permits an agency to exempt material from the individual access provision of the Act which would cause the identity of a confidential source to be revealed

only if all of the following conditions are met:

* * *

> The material is considered relevant and necessary to making a judicious determination as to qualifications, eligibility or suitability and could only be obtained by providing assurance to the source that his or her identity would not be revealed to the subject of the record. . . . (Emphasis added.)

The petitioner suggests that as long as the CSC routinely offers confidentiality through the rubber stamp box, it cannot possibly find out whether evaluation information "could only be obtained" by promising confidentiality. Indeed, the CSC received back 10 of the 16 forms which it mailed in June 1976 seeking evaluations of the petitioner (plus one letter in lieu of a form), and only 3 of the 11 requested confidentiality. That would seem to infer that most individuals who choose to evaluate an applicant will do so without a promise of confidentiality.

The Office of Management and Budget went on to say (40 FR 28974, July 9, 1975) that the CSC

> will issue regulations establishing procedures for determining when a pledge of confidentiality is to be made and otherwise to implement this subsection. These regulations and any implementing procedures will not provide that all information collected on individuals being considered for any particular category of positions will automatically be collected under a guarantee that the identity of the source will not be revealed to the subject of the record.
>
> This provision has been among the most misunderstood in the Act. It should be noted that it grants authority to exempt records only under very limited circumstances. "It will not be the customary thing to make these promises of confidentiality, so that most all of the information [in investigatory records] will be made available." (Emphasis added.)

Under these circumstances the burden should be on the CSC to establish that it cannot obtain sufficient evaluation information about an applicant for a rating or employment without promising confidentiality. It is an easy burden to carry if the CSC first makes a bona fide effort to obtain the information without offers of confidentiality, for it will then know how much or how little it obtains. The CSC did not do this with

the June 1976 evaluation forms and, as a result, it appears that their only reason for offering confidentiality was to withhold information as distinguished from protecting sources of information. If the CSC had not offered confidentiality routinely, the petitioner probably would not today be challenging the constitutionality of the provision which permits a limited withholding of confidentially collected material.

The petitioner has a right under the due process clause of the Fifth Amendment to the Constitution to a confrontory hearing on his application for an administrative law judge rating.

This Court said in Willner v. Committee on Character, 373 U.S. 96 (1963), that a State must meet the requirements of procedural due process under the Fourteenth Amendment before it can exclude a person from practicing law, and, further, that procedural due process (373 U.S., at 103) "requires confrontation and cross-examination of

those whose word deprives a person of his livelihood." This Court then added, 373 U.S., at 105,

> It does not appear from the record that either the Committee or the Appellate Division, at any stage in these proceedings, ever apprised petitioner of its reasons for failing to be convinced of his good character. Petitioner was clearly entitled to notice of and a hearing on the grounds for his rejection either before the Committee or before the Appellate Division. (Emphasis added.)

There is no closer factual and legal analogy to White's situation. If a person is entitled to Fourteenth Amendment procedural due process before a State can exclude him from practicing law, a lawyer is entitled to Fifth Amendment procedural due process before the United States can exclude him from employment as an administrative law judge. And procedural due process requires confrontation and cross-examination of those whose word deprives the lawyer of his livelihood as an administrative law judge. Although the petitioner has tried numerous times to ascertain the grounds for his rejection, he has been told only that his score is too low. He is clearly entitled to a hearing on that ground, if

it is in fact the ground for his rejection.

Furthermore, White has a right of access to, and to copy, the entire record upon which the Office of ALJs and the Board acted on his application and appeal, including, without limitation, the evaluations of him. His right of access is based on three grounds. First, it is part of his right under Willner to a hearing; otherwise, his right to confront and to cross-examine would be hollow. Second, he has an independent right of access under the due process clause of the Fifth Amendment. And third, he has a right of access under Section (d) of the Privacy Act.

With respect to his independent right under the due process clause, the United States District Court for the District of Minnesota in Norlander v. Schleck, 345 F.Supp. 595 (1972), quoted with approval from Cooley v. Board of Education of Forrest City School District, 453 F.2d 282, 285 (CA8, 1972):

> The jurisprudential basis upon which the constitutional doctrine of procedural Due Process rests is the judicially-created notion that when Government acts so as to affect substantial and protected individual interests or to adjudicate important and protected rights, the Due Process clause requires, in the absence of a significant countervailing governmental interest, that Government supply procedures which guarantee at least a modicum of fairness. . . . (Emphasis added by Norlander.)

Norlander described Willner, supra, as requiring minimal fair procedures "where entrance to a whole profession or career is controlled by a state licensing agency," which is similar to the way the Office of ALJs and the Board control the entrance to the administrative law judge profession or career. Furthermore, Norlander relied in part upon the Court of Appeals' decision in Scott v. Macy, 121 U.S.App.D.C. 205, 349 F.2d 182 (1965). And Norlander concluded,

> All persons . . . should have a right to or interest in fair consideration for public employment, including consideration for placement on the eligible civil service list. (Emphasis added.)

More important, Norlander concluded that the

claimed need of the government for confidential treatment of references was outweighed by the applicant's rights:

> Persons responsible for hiring and determining employment eligibility with the . . . government must of course have the information necessary to make correct decisions. But that need does not and should not extend so far as to allow totally inaccurate information, if any there be, to remain in the official files unrebutted. Information reported might be clerically erroneous, subject to interpretation or might on the other hand be the result of someone's maliciousness and evidence a vendetta-like opportunity to avenge screened by confidentiality. Nor should the alleged need for confidentiality extend so far as to allow decisions to be made on illegal grounds, if any such there be, to be umbrallaed under the general term "unsatisfactory references." Rather, on balance, the due process clause requires the source and substance of the references which are unsatisfactory be revealed so that they may be refuted if possible and a reasonable opportunity afforded so to do. (Emphasis added; footnote deleted.)

So, too, the Office of ALJs and the Board must have the necessary information. But they have received some erroneous information and some which has been designed to avenge, and the petitioner believes that they have interpreted

some of the information erroneously. Their alleged need for confidentiality should not extend so far as to allow their decisions to be umbrellaed under the general explanation that "the score assigned to your application was insufficient to meet the passing grade."

The right of access to records provided by Section (d) of the Privacy Act, and the limitation on that right contained in Subsection (k)(5), should be approached in the light of the petitioner's constitutional right to due process as interpreted in Willner and Norlander. In other words, the right of access of a person seeking a rating for government employment is not merely statutory, but a constitutional one.

The House version of the Privacy Act of 1974, which is the version that was finally enacted, did not originally permit the limited withholding of materials which is now embodied in Subsection (k)(5). It required full disclosure without exception. That version was amended by a 192 to

177 floor vote into what became Subsection (k)(5). 22/ The petitioner has researched the legislative history of the Privacy Act and has found no indication that Congress was aware of Norlander (which had been decided 28 months earlier) at the time of the floor vote. In any event, and in discussing that amendment (36656 Cong. Rec., November 20, 1974):

> Mr. GOLDWATER. . . . I can appreciate what the gentleman is trying to do, and that is to protect the parties' sources of information, but is there anywhere any protection to eliminate the inclusion of vicious rumors, subjective opinions, false statements, or honest mistakes that are in the records that are supplied by these parties?
>
> Mr. ERLENBORN. Yes. I would point out that the information in the file will be made available quite generally, whether it is derogatory, defamatory, or whatever. We will only protect the confidential source.

22/ The amendment sponsored by Congressman Erlenborn had been rejected 22 to 11 by the Committee on Government Operations. During the course of the proceedings the CSC opposed full disclosure of rating and employment application records and advocated, instead, a limited type of disclosure such as is now embodied in Subsection (k)(5).

Congressman Moorhead expressed his opposition to the amendment (36657 Cong. Rec., November 20, 1974):

> I oppose the amendment because I think it makes second-class citizens out of some 4½ million government employees, civil and military.

And the further exchange between Congressmen Goldwater and Erlenborn (36657 Cong. Rec., November 20, 1974) is set out below:

> Mr. GOLDWATER. . . . Mr. Chairman, I rise with certain reservations with regard to this amendment. I likewise am greatly concerned with protecting the rights of applicants for civil service employment and with insuring that the applicants have access to information about him [sic.] that is furnished by third parties. I likewise recognize the difficult question regarding policy matters contained in this particular bill, in that, if taken in its true sense, opens up disclosure of third-party information.
>
> I would like at this point to ask the auth. r of the amendment (Mr. ERLENBORN) a few questions if he would be kind enough to respond.
>
> Mr. ERLENBORN, what in this provision provides for the applicant to rebut or to countermand any vicious rumors or subjective opinions or false statements or honest mistakes taken from third parties about an individual?

Mr. ERLENBORN. . . . /T/he bill itself provides for the first time the right of access by an individual to records maintained concerning himself or herself, and the bill provides that if the individual believes that the information is inaccurate, he has a right to demand that the information be corrected. This is as to all records generally and can be applicable to these free /?/ employment and security investigation files as well. Therefore, the application of the bill -- not the amendment -- but the application of the bill is such that it provides this right to the individual to demand that a file be made accurate if he considers it to be inaccurate.

Mr. GOLDWATER. How will the applicant know that there is included in his file information from a third party or confidential source?

* * *

Mr. ERLENBORN. As provided in my amendment, the information contained in the file will be made available to the individual about whom the file has been maintained.

Only to the extent that the confidential source would be compromised would we keep the name of the individual who is the confidential source or such information as would identify him from the applicant. That information would be kept from the individual seeking information. Otherwise, all the rest of the contents of the file, including any of this derogatory information, would be made available to the jobseeker.

Mr. GOLDWATER. Is it your understanding that your amendment notwithstanding, the applicant would be allowed to file with this information obtained from a confidential source his own version or his own rebuttal or perhaps his own denial of that accusation or erroneous information?

Mr. ERLENBORN. Yes. Under the terms of the bill itself, that would be a remedy available to the individual about whom the file was kept.

* * *

Mr. GOLDWATER. One last question, Mr. Chairman, and that is: This gives discretion to the agency to arbitrarily decide which information it will supply, and which information it will withhold. The question that occurs to me is, Where is the check and balance? It is the intention of this committee that information should be disclosed to an applicant or to an individual upon request, but, if there is this discretion within the agency, then where is the check and the balance? Where is the impartial review, the in camera inspection to determine whether in fact all information is included, or whether in fact third parties should perhaps be made available?

Mr. ERLENBORN. . . . I think the general access to the courts, as we provided in the bill, would provide that.

The Analysis of House and Senate Compromise Amendments to the Federal Privacy Act states, in this connection (40881 Cong. Rec., December 18,

1974),

> The compromise provision for the maintenance of information received from confidential sources represents an acceptance of the House language after receiving an assurance that in no instance would that language deprive an individual from knowing of the existence of any information maintained in a record about him which was received from a "confidential source." The agencies would not be able to claim that disclosure of even a small part of a particular item would reveal the identity of a confidential source. . . .
>
> Furthermore, the acceptance of this section in no way precludes an individual from knowing the substance and source of confidential information, should that information be used to deny him a promotion in a government job. . . . (Emphasis added.) 23/

And the following question asked, and answer given by the sponsor of Subsection (k)(5), on the floor of the House of Representatives on December 18, 1974, is pertinent to the petitioner's right-to-know (40884 Cong. Rec., December 18, 1974):

> Mr. ALEXANDER. Let me ask the gentleman one further question. Suppose an individual believed that he had not been promoted in his Government job because of confidential derogatory information in his file, and that the Government refused to allow the individual access to that information on the grounds that allowing access would reveal the identity of the confidential source. Suppose further that the individual then went to court and demanded that he be promoted, arguing that nothing on the public record interfered with his right to the promotion. Would the Government then have to let him see the portion of his file which it had previously withheld?
>
> Mr. ERLENBORN. If the Government wanted to introduce the statement into evidence in court, it would surely have to allow the individual to see the statement. If the Government had no other reason for denying the promotion, it would in effect have two choices: Release the information which would reveal the identity of the confidential source or lose the case. (Emphasis added.)

23/ The CSC is, in effect, denying the petitioner an opportunity for a promotion.

After the Privacy Act was passed and before it went into effect, the General Counsel of the CSC said publicly (34 Federal Bar Journal 320),

> In the past, the Commission has deemed information gathered for personnel investigations as having been obtained from a confidential source and therefore protected by the informer's privilege. Thus, the Commission has refused to disclose the identity of such sources even when the individual investigated has challenged the Commission's determination in a court proceeding. As a result, the Commission has

found itself in the unenviable position of maintaining that a person is unsuitable for Federal employment based on information it has developed, while at the same time refusing to disclose the source of that information. This approach, of course, offends the traditional judicial notions of due process which require, at a minimum, that an individual adversely affected by information be informed of its source and given the opportunity to examine, cross-examine, or otherwise impugn its veracity. (Footnote omitted; emphasis added.)

The General Counsel then discussed and quoted from Norlander, and added,

> Under the new Privacy Act, information will not be considered, as a general rule, to have been obtained from a confidential source and thus subject to the privilege. Rather, a source is confidential only if the information is obtained "under an express promise that the identity of the source would be held in confidence." While the problem evinced by the Norlander case will continue to exist where sources obtain this express promise of confidentiality, it is anticipated that in most instances it will not be required. In fact, the legislative history of the Act contains positive expressions of Congressional intent that Federal investigators make sparing use of the ability to make express promises of confidentiality. Moreover, it is emphasized in the legislative history that an individual is not precluded from knowing the substance and the source of confidential information when that information is used to deny him a promotion in a Government job

> or access to classified information or some other right, benefit or privilege for which he would otherwise be eligible or to which he would otherwise be entitled. (Footnotes omitted; emphasis in original.)

The foregoing legislative history, including the matter of routine vs. selective offers of confidentiality, runs to the underlying question of whether Congress enacted the full disclosure statute it thought it was enacting. And if Congress did not -- if Subsection (k)(5) authorizes more withholding than Congress contemplated -- it appears that Congress (including the sponsor of Subsection (k)(5)) intended in conformity with the Norlander court that in the area of public employment, and promotion in public employment, the individual's right-to-know outweighs the government's need for confidentiality. The petitioner submits that Norlander is a correct application of the principles of due process and that that case is worthy of the approval of this Court.

The Privacy Act obviously touches every person who is the subject of a government record. It went into effect on September 27, 1975, about 3-1/2 years ago. This litigation raises a number of important legal issues under that Act, the judicial answers to which could determine whether it will provide major protections for our privacy, or whether it will suffer an early demise. If the Privacy Act does not become an effective tool for changing government records before harm is done by them, most people will have to rely on recovering damages after the harm is done. And if the government is not made to answer responsively to requests to change records, the pervasive practice of "stonewalling" will reduce the right to challenge records, to a hollow one, as would a decision permitting the withholding of materials which are needed for a confrontory hearing.

The petitioner has pressed his view of the unconstitutionality of Subsection (k)(5) at every level of this litigation and, as a result, the

CSC cannot complain that it was not informed in timely fashion that he intended to raise the issue for review by this Court. The fact is, however, that neither the District Court nor the Court of Appeals reached and addressed the issue. But in view of its importance and the fact that it may be decisive of the future course of the petitioner's litigation, this Court may wish to consider the words of the Supreme Court of Minnesota in Christensen v. Hennepin Transportation Co., Inc., 10 N.W.2d 406, 412 (1943),

> Sound judicial administration requires that not only unnecessary trials and appeals be avoided, but that cases be tried under correct rules of law. To that end, where a new trial is ordered, the appellate court will consider questions not technically before it which will arise on a new trial, especially where they may be decisive. Eames v. Barber, 192 Mich. 1, 158 N.W. 218; E.P. Wilbur Trust Co. v. Eberts, 337 Pa. 161, 10 A.2d 397. Cf. West Chicago Masonic Ass'n v. Cohn, 192 Ill. 210, 61 N.E. 439, 55 L.R.A. 235, 85 Am.St.Rep. 327.

Those words appear to be an application of the broader principle stated by Mr. Justice Black two years earlier in Hormel v. Helvering, 312 U.S.

552 (1941), at 557,

> There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed by the court or administrative agency below. . . .
>
> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

The petitioner submits that the constitutionality of Subsection (k)(5), at least insofar as it applies to Federal civilian employment, is an issue which has been pressed and should be considered by this Court even though it was not decided below.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment, opinion and

and orders of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

ALAN J. WHITE
8201 Snug Hill Lane
Potomac, Md. 20854

Petitioner, in propria persona

[Filed January 26, 1979]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1069 September Term, 1978

Alan J. White,
Appellant

v.

United States Civil Service Commission,
et al.

BEFORE: Wright, Chief Judge; McGowan and Wilkey, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing, it is

ORDERED, by the Court, that appellant's aforesaid petition is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

[Filed January 26, 1979]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1069 September Term, 1978

Alan J. White,
Appellant

v.

United States Civil Service Commission,
et al.

BEFORE: Wright, Chief Judge; Bazelon, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb, and Wilkey, Circuit Judges

O R D E R

The suggestion for rehearing en banc filed by appellant White having been transmitted to the full Court and no judge having requested a vote with respect thereto, it is

ORDERED, by the Court, en banc, that appellant's aforesaid suggestion for rehearing

en banc is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1069

ALAN J. WHITE, APPELLANT

v.

UNITED STATES CIVIL SERVICE COMMISSION, *et al.*

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 77-0274)

Argued November 27, 1978

Decided December 11, 1978

Alan J. White, pro se.

Michael L. Lehr, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, and *John A. Terry* and *Michael W. Farrell*, Assistant United States Attorneys, were on the brief, for appellee.

Before WRIGHT, *Chief Judge*, and MCGOWAN and WILKEY, *Circuit Judges*.

Opinion for the court *per curiam*.

PER CURIAM:

I

At the core of this dispute are certain evaluations of appellant Alan J. White that were solicited by the United States Civil Service Commission in connection with appellant's application for the position of administrative law judge. The five evaluations at issue were submitted by former colleagues and supervisors of appellant when he was an attorney with the Federal Power Commission.[1] Appellant was apparently worried that, because he had experienced some employment difficulties during his tenure at the FPC, the evaluations might have mischaracterized the manner in which he had discharged his duties. He sought, therefore, to have these potentially damaging evaluations removed from his application records on file with the Civil Service Commission by pressing a claim under the Privacy Act of 1974. Arguing that his application records were indeed "records" under the Act, 5 U.S.C. § 552a(a)(4) (1976), appellant contended that it was possible to amend the evaluations under a corresponding provision in the Act, because those evaluations were "not accurate, relevant, timely, or complete." 5 U.S.C. § 552a(d)(2)(B)(i) (1976). The precise amendment sought by appellant was in fact deletion of the five evaluations from his file.

Appellant's request pursuant to the Privacy Act was denied by administrative action and affirmed on administrative appeal. Thereafter, appellant filed the present suit with the United States District Court in which he sought *de novo* review of his Privacy Act claims. *See* 5 U.S.C. § 552a(g) (1976). In the suit he charged appellees—the United States Civil Service Commission, one of its officers, and the Director of the Office of Administrative Law Judges—with violation of various provisions of the Act.

This appeal challenges the decision of the District Court, which granted appellees' motion for summary judgment on grounds that records pertaining to appellant's application for the position of administrative law judge were not "records" within the meaning of the Privacy Act of 1974, 5 U.S.C. § 552a(a)(4) (1976), and thus were not subject to amendment under that Act. 5 U.S.C. § 552a(d) (1976). To an extent we agree with the District Court; appellant's suit was properly dismissed. But we disagree with the grounds for dismissal offered by the trial judge, for we hold that appellant's application records are indeed records under the Act. However, because the possibility of judicial review of adverse administrative decisions taken with respect to appellant's employment application still exists, we consider the present appeal an inappropriate juncture at which to grant the relief sought under the Privacy Act.

II

The Privacy Act defines "record" as

> any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph[.]

[1] During the course of his dispute with the Civil Service Commission appellant was granted access to one of these evaluations and to parts of the other four.

5 U.S.C. § 552a(a)(4) (1976). Without stating its reasons, the District Court held that appellant's application records do not fall within this definition.[2] We disagree, and indeed are joined in our disagreement by appellees themselves, who concede in their brief on appeal that appellant was correct in deeming the evaluations contained in his application file to be "records" under the Act. Appellees' brief at 8. In holding that appellant's application records are within the Act's definition, we need resort only to the quoted language. That his application comprised "information about an individual that is maintained by an agency, including * * * his * * * employment history" is incontestable.

Appellees do not concede, however, that appellant is entitled to amend these records. They argue not only that the evaluations are by their very nature subjective, and thus not susceptible to objective verification and amendment, but also that amending them in any rational way would entail a degree of inspection not compatible with maintaining the confidentiality of those who submitted the evaluations.[3]

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[2] In the words of the District Judge, "[I]t appear[ed] to the Court that the records at issue are not the sort of records which are subject to amendment under the provisions of the Privacy Act of 1974 * * *." Appellant's Appendix at 355.

[3] In support of the latter contention, appellees cite 5 U.S.C. § 552a(k)(5) (1976), which, so long as the agency has promulgated rules so providing, exempts from amendment

> investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, * * * but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

 [continued]

It is neither necessary nor desirable to decide now the extent to which appellant may modify his application file in accordance with the Privacy Act. For in our view providing relief under the Privacy Act now is inappropriate and premature. Although appellant has unsuccessfully appealed within the Civil Service Commission the adverse administrative decisions with respect to his application for employment, he has yet to seek the judicial review of those decisions to which he is entitled under the Administrative Procedure Act, *see* 5 U.S.C. §§ 702, 704, 706(2)(A) (1976), which, as the parties agreed at oral argument, is still available to him. *See* 28 U.S.C. § 2401(a) (1976); *Oppenheim v. Campbell*, 571 F.2d 660, 662-663 (D.C. Cir. 1978). If in this action we were to grant appellant the relief he seeks under the Privacy Act, our decision would tend to undermine the established and proven method by which individuals, distressed by agency treatment of their employment applications, have obtained review from the courts. There is absolutely no indication that Congress had this in mind when it passed the Privacy Act.[4]

The Privacy Act may yet, of course, be of substantial importance in defining the course of appellant's employ-

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Appellees' brief at 16-17. Of course, since appellant has already had complete access to one of the evaluations and partial access to the other four, *see* note 1 *supra*, a future trial court may have to decide whether this exemption has continuing relevance to this case.

[4] Appellant conceded at oral argument that his purpose in bringing this Privacy Act suit was to modify the record of his administrative proceeding, so that a future District Court reviewing the administrative decision of the Commission with respect to appellant's application for employment would not be confronted with the five possibly adverse evaluations. We believe, however, that in such a case an assessment of Privacy Act claims is properly undertaken simultaneously with the District Court's review of the administrative action, rather than antecedent to such review.

ment fortunes, but the place for its invocation is on appeal to the District Court of the underlying administrative judgment made with respect to his application. We stress that our holding does not in any way seek to jeopardize rights under the Privacy Act to which appellant may ultimately be entitled; rather, we hold that his reliance on any such rights in the instant suit is inappropriate.

Affirmed.

[Filed December 7, 1977]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAN J. WHITE, Plaintiff	:	CIVIL
v.	:	ACTION
UNITED STATES CIVIL SERVICE COMMISSION, et al., Defendants	:	77-0274

ORDER

Upon consideration of Defendants' Motion to Dismiss, or in the Alternative for Summary Judgment, and upon consideration of the opposition thereto and the entire record in this case, the Court finding that there exist no genuine issues of material fact, and it appearing to the Court that the records in issue are not the sort of records which are subject to amendment under the provisions of the Privacy Act of 1974, 5 U.S.C. §552a, Irvin H. Mason, et al., v. Martin R. Hoffman, Civil Action No. 76-182-A (E.D. Va., March 30, 1977), and it further appearing that

Plaintiff's rights under the Privacy Act have been honored and that the Privacy Act is not the proper vehicle by which to appeal the rating received on Plaintiff's applications for a position as an administrative law judge, it is by the Court this 7th day of December, 1977,

ORDERED, that the Defendants' Motion for Summary Judgment be and it is hereby GRANTED, and judgment shall be entered for Defendants herein.

AUBREY E. ROBINSON, JR.
United States District Judge